No. 69

In the Supreme Court of the United States

OCTOBER TERM, 1967

VOLKSWAGENWERK AKTIENGESELLSCHAFT, PETITIONER

v.

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINIONS BELOW

The opinion of the court of appeals (R. 779–801) is reported at 371 F. 2d 747. The report of the Federal Maritime Commission (R. 666–728) is printed at 9 F.M.C. 77.

JURISDICTION

The judgment of the court of appeals (R. 802) was entered on December 22, 1966. The petition for a writ of certiorari was filed on March 20, 1967, and was granted on June 12, 1967. (R. 803). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 2350(a) (Supp. II).

STATUTES INVOLVED

The pertinent provisions of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*, are printed in the Appendix, *infra*, pp. 43–46.

QUESTIONS PRESENTED

An employers' association, consisting of the ocean carriers, terminal operators and stevedore contractors serving the West Coast ports, entered into a collective bargaining agreement with the longshoremen's union. The agreement called for the creation by the employers—by whatever method they chose—of a $29 million fund for the protection of longshore employees displaced by mechanization of the docks. The association's members subsequently agreed among themselves that each employer would be assessed its contribution to the mechanization fund under a formula based on tonnage handled. Foreign automobiles were assessed much more heavily than other forms of cargo and terminal operators handling Volkswagen automobiles could not absorb the heavy assessment and passed it on to Volkswagen. The questions presented are:

1. Whether the implementation of the employers' arrangement for allocating the cost of the mechanization fund among themselves is unlawful because their agreement was not filed with the Federal Maritime Commission under Section 15 of the Shipping Act.

2. Whether the Commission failed adequately to consider Volkswagen's charge that the automobile assessment unduly or unreasonably prejudiced or disadvantaged it, in violation of Section 16 of the Act,

or was an unjust or unreasonable practice, in violation of Section 17.

STATEMENT

The relevant facts, as set forth in the initial decision of the Commission's hearing examiner (R. 612–656) and in the Commission's report (R. 666–678) are largely undisputed.

1. THE PARTIES

Petitioner, the manufacturer of Volkswagen automobiles, is one of the largest users of the West Coast ports of the United States, importing through them more than 40,000 Volkswagen vehicles each year. Of these, about 75 percent are transported on vessels chartered by petitioner; the remainder are transported on common carriers (R. 614).

Respondent Marine Terminals Corporation and Marine Terminals Corporation of Los Angeles ("Marine Terminals") operates as a stevedoring contractor and as a marine terminal operator serving both common carriers and contract carriers. It assumes responsibility for moving cargo from the vessel to a point of storage in the terminal and performs related clerking, sorting and checking services. It has performed these services for petitioner since 1954 (R. 614–616). About 90 percent of the automobiles handled by Marine Terminals at San Francisco and Los Angeles are Volkswagens (R. 669). When this controversy arose, Marine Terminals was being paid by petitioner at the rate of $10.45 per vehicle for the entire package of labor and services; its profit margin was $1.00 or less (R. 144–146). Because of improve-

ments to shipboard equipment, the unloading of automobiles in recent years has involved relatively efficient and modern procedures and has been relatively free of "featherbedding" practices (R. 633).

Respondent Pacific Maritime Association ("the Association") is an association of some 120 carriers, stevedoring contractors, and terminal operators (including Marine Terminals), serving West Coast ports. Shippers, such as petitioner, are not eligible for membership. The Association's primary function is to negotiate and administer collective bargaining contracts with the International Longshoremen's and Warehousemen's Union covering both the onshore employees of the stevedoring contractors and terminal operators and the offshore employees of the carriers, this case concerns only the former. Under the Association bylaws, each member is bound by its approval of a union contract (or any other contract imposing personal liability) unless it resigns from the Association within seven days of the vote approving the contract (R. 617).

2. THE ESTABLISHMENT OF THE MECHANIZATION FUND

Late in 1960, the Association agreed with the union that it would create a "Mechanization and Modernization Fund." The agreement on the fund, formalized in a collective bargaining agreement between the Association and the union signed in 1961 (R. 279),

represented what was hoped to be the solution to serious problems of long standing—the opposition of the union to the introduction of labor-saving devices and to the elimination of featherbedding practices, periodic work slowdowns and stoppages, and an environment of hostility between management and labor on the docks. The Association undertook to create over a period extending from 1961 through 1966 a trust fund of $29 million (including $1.5 million raised at an earlier point in the negotiations as a sign of good faith) to be used for paying certain benefits to the employees. The agreement specifically reserved to the Association the right to choose a method for collecting the necessary amounts from its members, and to change that method as it saw fit (R. 620). The union, for its part, agreed to eliminate some specific restrictive work practices and to accept a procedure whereby the employers could introduce changes in the traditional methods of handling cargo subject to prior consultation with the union and, in the event of dispute, arbitration.

3. THE ASSESSMENT FORMULA

Even before the mechanization fund was fully worked out with the union, the Association began exploring methods for allocating the cost among its members. In January 1961, a Work Improvement Fund Committee issued a report discussing five possible methods of allocation (R. 466–474). A majority of the committee recommended adoption of a formula assessing stevedoring contractors according to

the number of "revenue tons" of cargo handled. The proponents argued that a tonnage (as opposed to man-hour) assessment would assure that the stevedoring contractors who, by introducing the labor-saving devices, caused the greatest loss of employment would still contribute substantially to the fund (R. 468–469). A minority of the committee recommended that the cost of the fund be allocated under a combination of formulas, already used to allocate Association dues: part according to the number of revenue tons loaded or unloaded, and part according to the number of man-hours of labor employed (R. 475–479). The Association's membership adopted the majority recommendation. Following the practice used in assessing Association membership dues, the tonnage rate for bulk cargo was set at one-fifth of the rate for general cargo. Dividing the amount which had to be raised by the estimated revenue tonnage of cargo, the Association's Board of Directors set an assessment rate (later modified in minor respects not material here (R. 637)) of 27½ cents per revenue ton of general cargo and 5½ cents per revenue ton of bulk cargo (R. 624).

A revenue ton is an artificial measure used in computing freight rates for ocean shipping. It is measured either on a weight-ton basis (2,000 lbs.=1 ton) or a measurement-ton basis (40 cu. ft.=1 ton). The Association decided that "tonnage declarations by companies are to be made in exactly the same manner as manifested and reported to the Association for dues purposes during the year 1959" (R. 625). However, the practice with respect to the mani-

festing of automobiles was not uniform. On charter vessels they were manifested on a unit basis showing weight and sometimes measurement also. On common carriers—whose tariffs are on a unit basis—both weight and measurement were shown. And in the coastwise trade automobiles were manifested and freighted by weight (R. 670).

Accordingly, there was confusion among the Association's members as to whether automobiles should be assessed on a weight-ton or measurement-ton basis. In February 1961, the Association advised its members that reports of tonnage dues on automobiles should always be made on a measurement basis (R. 524). The same month, an Association committee report declared that the "Mechanization Fund assessment for autos should be on a measurement ton basis, regardless of how manifested" (Ex. 44, R. 691).

4. THE OBJECTIONS TO THE AUTOMOBILE ASSESSMENT

The average Volkswagen vehicle measures 0.9 tons by weight and 8.7 tons by volume. On a weight basis, the assessment on Volkswagen would average 25 cents per vehicle. On a volumetric basis, the assessment would average more than 10 times as much—about \$2.35 per vehicle. The assessment thus increased the cost of unloading Volkswagens by an average of more than 20 percent (R. 626, 670),[1] compared with an

[1] There are several sizes of Volkswagen automobile, including a small "bug-shaped" sedan and a larger box-like vehicle known as a transporter. Unloading costs of the former were estimated to have increased 22 percent, and of the latter 31 percent (R. 512).

average increase of 2.2 percent for other cargo. No other commodity was so drastically affected by the assessment as automobiles (R. 482, 627–628). The volumetric assessment could not be absorbed by the stevedoring contractors, since, as mentioned, at existing rates their average profit per vehicle was only one dollar (R. 640, n. 27).

At about the time that the general membership of the Association approved the assessment formula, officials of Marine Terminals met with officials of the stevedoring contractors who handle the unloading of petitioner's cars in other West Coast ports. It was the consensus of the group that the company doing the discharging would be unable to absorb the contribution if it was assessed on a measurement basis (R. 626–627) and that they would have to pass on the assessment to petitioner. Shortly after January 16, 1961, Marine Terminals began adding to its statement of charges to petitioner an amount for the mechanization fund computed on a measurement-ton basis (R. 627). Petitioner refused to pay Marine Terminals this additional charge.[2]

Marine Terminals objected to the Association that the assessment of automobiles on a measurement-ton basis was unfair, arbitrary and without foundation in industry practice. It suggested a unit method of assessment (R. 630, 670). The Association rejected the protest. Volkswagen also protested to the Asso-

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[2] At one point, Marine Terminals made an offer to petitioner to absorb a portion of the assessment equal to what it would have been on a weight-ton basis, but the offer was rejected (R. 627).

ciation. In a letter of January 17, 1961, petitioner's agent complained that the assessment placed a discriminatory burden on automobiles, that the automobiles transported on its chartered vehicles were consistently manifested on a unit basis rather than a measurement basis, and that the volume measurement of the automobiles had no relevance to the cost of unloading them (R. 484–485). Volkswagen's protest was considered by a committee charged with responsibility for overseeing operation of the assessment procedure and recommending improvement; the protest was rejected. Without any specific discussion of petitioner's objection to the measurement-ton formula, the committee stated only that the unloading of automobiles had a low "labor content" (although it was still susceptible of some future improvement), and that "save for the traditional exception of bulk cargoes, there should be no special adjustment of the tonnage assessment by commodity" (R. 488).

In May 1961 the committee requested suggestions from Association members on methods of improving or changing the assessment method, and Marine Terminals, along with several other Volkswagen unloaders, urged that a unit rate be established for automobiles. Representatives of petitioner and its stevedoring contractors met with the committee in November 1961. Apparently the Association considered possible modifications of the measurement-ton formula (such as setting a maximum limit to the assessment on a measurement-ton basis at five times the assessment on a weight-ton basis (R. 515)), but

in March 1962 it informed petitioner that its protest had again been rejected (R. 629–630).

Although the Association declined to make any changes in the assessment of automobiles, it did from time to time make changes in the assessment of other commodities (scrap metal, and logs and lumber moving in the coastwise trade) to remedy alleged inequalities. The modification of the assessment rate for lumber[a] was apparently influenced by the inability of the industry to bear the full assessment under the original formula (R. 502–504).

5. THE SUIT AGAINST PETITIONER AND THE REFERENCE TO THE COMMISSION

In December 1961 Marine Terminals, which had characterized itself as "only a collection agency" in this matter (R. 486), requested authorization from the Association to sue petitioner for the unpaid mechanization fund assessments (R. 634). At a meeting of December 13, the board of directors determined to give Marine Terminals legal and moral support if such an action were started and to have the Association participate directly in it (R. 634). In July 1962, however, the board modified this decision to provide that the Association would assist Marine Terminals only to the extent that there were issues raised in an action by it against Volkswagen which might jeopardize the mechanization fund (R.

[a] Lumber is assessed under a special tonnage formula (1,000 bd. ft.=1 ton). In July 1962 the rate on coastwise lumber was reduced to 5¢ per ton because of special penalty rates applicable only to lumber (R. 631a).

634). Volkswagen's failure to pay the assessment was evidently regarded as posing a serious threat to the continuation of the fund (R. 517–518). While the Association decided not to attempt to proceed directly against Volkswagen, it recognized that Marine Terminals and the other stevedoring contractors could not realistically be expected to pay the assessment on automobiles unless they, in turn, had an effective method of obtaining reimbursement from petitioner (R. 504, 507–508, 518).

In August 1962, the Association decided to sue Marine Terminals for the latter's failure to pay the assessments on automobiles handled by it, and brought a libel in the United States District Court for the Northern District of California against Marine Terminals. Marine Terminals admitted all of the allegations of the complaint and impleaded Volkswagen as a third party defendant, charging that Volkswagen had failed to pay Marine Terminals' unloading charges in full (*i.e.*, including the mechanization fund assessment). On Volkswagen's motion, the district court stayed the action while it invoked the primary jurisdiction of the Federal Maritime Commission (see *United States* v. *Western Pacific R. Co.*, 352 U.S. 59) to decide the following issues (R. 671–672):

> 1. Whether the assessments claimed from Volkswagen were being claimed pursuant to an agreement or understanding that is required to be filed with, and approved by, the Federal Maritime Commission under Section 15 of the Shipping Act before any step to implement it could lawfully be taken.

2. Whether the assessment claimed from Volkswagen would subject its automobile cargoes to undue and unreasonable prejudice or disadvantage, in violation of Section 16 of the Shipping Act.

3. Whether the assessments claimed from Volkswagen constitute an unjust and unreasonable practice, in violation of Section 17 of the Act.

Volkswagen then filed a complaint with the Commission against Marine Terminals; the Association intervened; and the Commission conducted a full hearing.

6. THE DECISIONS OF THE COMMISSION AND THE COURT OF APPEALS

The hearing examiner dismissed the complaint and, with two dissents, the Commission affirmed. 9 F.M.C. 77. The majority of the Commission held that the arrangement among the Association's members for allocating the assessment among themselves was not an agreement subject to Section 15 of the Shipping Act because it did not involve "practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or travelling public or their representatives." (R. 674.) "What must be demonstrated before a section 15 agreement may be said to exist is that there was an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators." (R. 675.) It found no such agreement.

The Commission concluded that Section 16 had not been violated because competitive cargo—other auto-

mobiles—had not been preferred (R. 676). As to Section 17, it did not consider whether the Association was guilty of an unreasonable practice in the method of computing the assessment, but confined its discussion to the reasonableness of Marine Terminals' passing on the charge to Volkswagen. It held that, since there was no proof of an intent to discriminate, the assessment had been reasonably "levied in its present form because it was necessary in the business judgment of respondent to do so." (R. 677.)

Petitioner sought review of the Commission's order in the Court of Appeals for the District of Columbia Circuit,[4] which affirmed. 371 F. 2d 747. The court held that the Commission's determination and application of Section 15 presented essentially a question of fact and that its determination was supported by substantial evidence within the criteria of *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607. It found it unnecessary to pass on the application of Section 16 because it held that, under Section 17, the assessment of automobiles on a measurement-ton basis was reasonable in the light of past practices in the collecting of the Association's general dues.

The California suit remains stayed pending completion of judicial review of the Commission's order. The assessment on Volkswagen automobiles continues.[5]

[4] Clearly, the Commission's order dismissing petitioner's complaint was a "final order," and hence reviewable only by instituting a judicial review proceeding in the court of appeals. 5 U.S.C. 1032; see *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202. No one suggests otherwise.

[5] The fund was originally to be completely collected by 1966. That date has been extended, however, to permit enlargement of the fund, and the assessment continues in effect.

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SUMMARY OF ARGUMENT

An employers' association of maritime companies agreed to create a "mechanization fund" for the benefit of longshore employees displaced by automation. The members of the association then agreed among themselves to collect the necessary moneys through a special assessment on each revenue ton of cargo handled. The assessment on foreign automobiles (principally Volkswagens) was so high—more than 20 percent of existing stevedore charges—that the stevedore contractors and marine terminal companies were unable to absorb it themselves and were forced to pass it on to Volkswagen.

I

Petitioner contends that the agreement among the association members imposing the mechanization fund assessment was ineffective because not filed with the Federal Maritime Commission. We agree. Section 15 of the Shipping Act requires all agreements among persons subject to the Act providing for a "cooperative working arrangement" to be filed and approved before being implemented. The allocation agreement was clearly of this character. This conclusion is compelled not merely by the language but also by the purpose of Section 15: to afford the Commission an opportunity to determine, in advance, whether maritime agreements that could unduly restrain competition or injure shippers should be forbidden as contrary to the public interest or permitted with antitrust immunity. The agreement at issue here is vigorously attacked as discriminating against a ship-

per, and may raise serious questions under the conspiracy provisions of the Sherman Act. The scheme of the Shipping Act requires that such an agreement be scrutinized at the outset by the Maritime Commission under Section 15, not left to later or piecemeal challenge under other provisions.

The ruling we urge would import no interference with the collective bargaining process in the maritime industry. The allocation of the cost of the mechanization fund among the members of the employers' association is a purely internal matter of the employers. It involves no issue of labor relations; it is a matter of indifference to the union.

II

Apart from Section 15, the allocation agreement as it affects petitioner raises serious issues under other provisions of the Shipping Act to which the Commission, in our view, gave inadequate consideration. Section 16 forbids subjecting particular shippers to any unreasonable prejudice or disadvantage. Section 17 forbids unreasonable practices relating to the handling of cargo by maritime companies. On the face of it, there is merit in the claim that both provisions are offended by the automobile assessment. It burdens one class of cargo—automobiles—far more heavily than any other—and automobile shippers probably benefit least directly from the contemplated steps to further mechanization of the docks. The only justification suggested is that any assessment method would necessarily weigh more heavily on some shippers. This, we regard as inadequate, especially since in assessing automobiles the association departed from

the formula it employed for other cargo. Accordingly, we urge that the Commission be directed to give further attention to petitioner's charges of discrimination.

ARGUMENT

I

THE MECHANIZATION FUND ASSESSMENT AGREEMENT COULD NOT LAWFULLY BE IMPLEMENTED UNTIL FILED WITH, AND APPROVED BY, THE FEDERAL MARITIME COMMISSION PURSUANT TO SECTION 15 OF THE SHIPPING ACT

The Pacific Maritime Association—a trade association for collective bargaining composed of the ocean carriers and marine terminal operators serving West Coast ports—agreed with the union representing the stevedores and longshoremen at those ports to raise for their benefit a fund to cushion the impact of a program to eliminate feather bedding and increase mechanization of stevedoring and longshoring operations. The members of the Association then agreed among themselves upon a special assessment levied on each ton of cargo handled as the method of raising the "mechanization fund." The first question presented is whether the implementation of this latter agreement—fixing the assessment—is unlawful (as petitioner contends) because it was not filed pursuant to Section 15 of the Shipping Act, 1916, as amended, 46 U.S.C. 814.

That provision requires that there be filed with the Federal Maritime Commission "every agreement" among those subject to the Act

> fixing or regulating transportation rates or fares; giving or receiving special rates, accom-

> modations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. * * *

Until and unless it is submitted to, and approved by, the Commission, "it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement"; heavy civil penalties are imposed for infractions of this prohibition. Section 15 goes on to direct the Commission to cancel any filed agreement—

> that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of [the Act]. * * *

And, finally, it is provided that Commission approval immunizes an agreement from challenge under the antitrust laws.

We stress that the Section 15 question in this case is not whether the assessment agreement should have been approved or disapproved, but whether the agreement—good or bad—is unenforceable because it has not been filed with the Commission. We think so.

A. THE PLAIN LANGUAGE AND EVIDENT PURPOSES OF SECTION 15 COMPEL THIS CONCLUSION

1. An agreement among maritime companies allocating a shared cost incurred under an industry-wide collective bargaining contract is within the literal terms of the filing requirement of Section 15. The assessment formula—none contests—was an "agreement"; the parties were subject to the Act;[6] and, in establishing a common plan to discharge their joint obligation to the employees under the collective bargaining agreement, the Association members entered into a "cooperative working arrangement." This much the Commission itself recognized. Nor would it strain the statute to also view the agreement—were it necessary—as "giving * * * special privileges or advantages" (which it clearly does for at least one class of cargo, see *infra*, pp. 36–42); as "regulating * * * competition" (since agreements allocating joint costs have traditionally been viewed in that light, see *infra*, p. 24); and as "providing for a * * * preferential * * * arrangement" (in view of the allegation that the burdens of the agreement fall unequally on the members of the shipping public).

[6] The common carriers by water which belong to the Pacific Maritime Association are conceded to be subject to the Act. The Commission assumed as much with regard to the maritime terminal companies. The examiner specifically so found (R. 641–642) and this finding was correct. The Act embraces (besides carriers) "any person * * * carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water" (46 U.S.C. 801), and it is not denied that the marine terminal companies which belong to the Association provide such facilities in connection with common carriers by water. See *California* v. *United States*, 320 U.S. 577.

The burden of persuasion on the question of the applicability of Section 15 would seem to lie with those who would carve out an exception to the broad statutory language, which so clearly covers the type of agreement involved here. Yet, we do not rest our affirmative case with the words of the enactment. The legislative history, design and manifest purposes of the Shipping Act argue strongly for giving Section 15 its literal force in this instance.

2. For a very long time the Nation has seen a serious danger in the untrammeled concert of action among businessmen—in cartels, price-fixing agreements, group boycotts, and other forms. This distrust is rooted in concern with the monopolistic abuses that such agreements foster, and, beyond that, in hostility to allowing private firms to exercise quasi-governmental powers of economic regulation. As early as 1890, the Sherman Act broadly prohibited combinations, contracts, and conspiracies to restrain trade or to monopolize.[7] To be sure, that legislation proved ineffectual in the shipping industry, partly because the special conditions of that industry seemed to warrant some cooperative restrictions upon free competition. Yet, serious and frequent abuses soon called for regulation.

[7] Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. 1, provides: "Every contract, combination in the form of trust of otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *." Section 2 provides: "Every person who shall * * * combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

It was against a background of increasing concern over the prevalence of government by private agreement and understanding in the ocean freight industry that the Shipping Act was enacted in 1916. See *Maritime Board* v. *Isbrandtsen Co.,* 356 U.S. 481, 487–490; *id.* at 511–513 (dissenting opinion of Mr. Justice Frankfurter). This concern extended far beyond the direct fixing of rates by agreement among the carriers. The report of the Alexander Committee [8] explored in detail the extent to which the decisions that importantly affected the shipper of goods or the traveler were made, not by the individual carrier or the terminal warehouseman with whom he dealt, but, rather, by monopolistic conferences and combinations. While concluding that some exemption from the antitrust laws was necessary to accommodate the unique needs of the shipping industry, the Committee expressed strong objection to the unsupervised exercise of quasi-governmental power by steamship conferences and other such combinations. The Committee stated (H. Doc. No. 805, 63d Cong., 2d Sess., p. 418):

> All monopolies are liable to abuse, and in our foreign carrying trade the monopoly obtained by the conference lines has not been subjected to any legal control. While carriers by land are supervised and must conform to statutory requirements in the matter of rates and treatment of shippers, steamship companies, through

[8] House Committee on the Merchant Marine and Fisheries, *Report on Steamship Agreements and Affiliations in the American Foreign and Domestic Trade*, H. Doc. No. 805, 63d Cong., 2d Sess. The recommendations in this report provided the basis for the Shipping Act. *Isbrandtsen, supra,* 356 U.S. at 490.

private arrangements, have secured for themselves monopolistic powers as effective in many instances as though they were statutory. Even granting the advantages claimed for steamship conferences and agreements, all may be withdrawn in the absence of supervisory control without the shippers having any redress or protection. The lines are under no legal obligation to continue these advantages. They exercise their powers as private combinations and are apt to abuse the same unless brought under effective government control.

While a number of the provisions of the Act relate to abuses of monopoly power by individual carriers or other persons subject to the Act,[9] Section 15 is central to the statutory scheme of bringing concerted action by members of the maritime industry under more effective control. In terms, it embraces anticompetitive agreements—those fixing rates, allocating markets, regulating the supply of services, discriminating among customers or excluding competitors; indeed, all agreements "controlling, regulating, preventing, or destroying competition"; and, for good

[9] Section 14, 46 U.S.C. 812, prohibits carriers from paying or allowing deferred rebates to any shipper; using "fighting ships" for the purpose of driving competing carriers out of the trade; retaliating against shippers who patronize other carriers; or unfairly or unjustly discriminating against shippers. Section 16, 46 U.S.C. 815, forbids any person subject to the Act to give any undue or unreasonable preference or advantage, or to engage in certain other unfair practices. Section 17, 46 U.S.C. 816, besides requiring all persons subject to the Act to establish, observe and enforce just and reasonable regulations relating to the handling or delivery of cargo, forbids unjust discrimination by common carriers by water.

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measure, all other cooperative working arrangements as well. The overriding concern with agreements which affect competition is emphasized in the provision directing the Commission to disapprove agreements embraced by Section 15 not only if they injure the commerce of the United States or the public interest but also if they contravene any of the specific prohibitions of the Act—most of them concerned with competitive abuses (see n. 9, *supra*, p. 21)—and in the further stipulation immunizing an agreement approved by the Commission from attack under the antitrust laws.

The background and structure of Section 15 reveal, we suggest, four interlocking purposes: (1) to force into the open, and assure Commission scrutiny of, all agreements that confer monopoly power or facilitate its exercise or abuse; (2) to provide a regulatory counterpart to Section 1, and the conspiracy provision of Section 2, of the Sherman Act; (3) to protect the industry's interest in reasonable restraints of competition by empowering the Commission, in appropriate circumstances, to immunize agreements that would otherwise violate the strict prohibitions of the Sherman Act; (4) to avert costly misplaced reliance on agreements that might prove to violate the antitrust laws or a specific prohibition of the Shipping Act, by requiring advance approval by the Commission of all such agreements.

Each of these goals would be thwarted by deeming the mechanization fund assessment agreement exempt from Section 15.

(1) The central concern of the Shipping Act in general and of Section 15 specifically was, as we have noted, to prevent members of the maritime industry from abusing the monopoly power that they enjoyed by virtue of being joined together in conferences or other combinations. The agreement challenged here binds together carriers and terminal operators who, thus leagued, completely dominate the shipping industry of the West Coast. Petitioner charges—and the charge is far from frivolous, as we show *infra*, pp. 34–42—that the agreement unfairly favors other shippers at its expense. Unless the agreement is declared unlawful, petitioner will have to yield to the marine terminal companies' demand that it shoulder the burden of the assessment on Volkswagen vehicles unloaded by them.

The present case thus squarely poses the question whether an allegation that a shipper has been victimized by a monopolistic combination of maritime firms must be appraised by the Commission before such a combination is implemented. We think it plain that Congress, in enacting Section 15, intended that it should be. Were it otherwise, the public would lack dependable protection against the harmful consequences of such agreements. Unless forced into the open by the filing requirement of Section 15 (and by the heavy sanctions that non-compliance with that requirement visits on the parties), the terms of the agreement might go undetected and unchallenged. And even if known, the agreement might elude effective remedial action under the remaining provisions of the Shipping Act and other applicable laws. Section

15 gives the public the broadest and most flexible protection by empowering the Commission to disapprove any agreement that it finds detrimental to the commerce of the United States or contrary to the public interest; no more specific adverse effect need be established.

(2) If Section 15 is to fulfill its framers' desire to create an effective regulatory substitute for the conspiracy provisions of the Sherman Act, any agreement, other than for merger,[10] which presents a Sherman Act question should be submitted to the Commission's scrutiny in advance of implementation. The Commission may, of course, approve it; if it does so, an antitrust suit will not lie. But, under the scheme of the Shipping Act, the Commission should also have the opportunity to disapprove it. It is plain that an agreement among competitors allocating a shared cost—the agreement here—is normally subject to the Sherman Act, since it may have a direct impact—as petitioner contends is the case here—on the prices paid by particular customers of the parties to the agreement. Cf. *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 221–224; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.,* 334 U.S. 219, 235; *Anderson* v. *Shipowners Ass'n,* 272 U.S. 359; *National Macaroni Mfrs. Ass'n* v. *Federal Trade Com-*

[10] Unlike the Interstate Commerce Commission and the Civil Aeronautics Board, the Maritime Commission has no express authority to approve mergers. Compare 49 U.S.C. 5(2), 1384. Such an omission has been deemed significant in other contexts. See *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 217–220; cf. *California* v. *Federal Power Commission,* 369 U.S. 482, 485.

mission, 345 F. 2d 421 (C.A. 7). That the shared costs originated in a collective bargaining agreement would not create an antitrust exemption. *Mine Workers* v. *Pennington*, 381 U.S. 657; *Meat Cutters* v. *Jewel Tea*, 381 U.S. 676.

(3) To exempt the agreement here from Section 15 would, of course, place it beyond the power of the Commission to immunize from challenge under the antitrust laws, and might result in outlawing such agreements in all circumstances. *United States* v. *Socony-Vacuum Oil Co., supra.* The scheme of the Shipping Act is to empower the Commission, not merely to condemn, but also to condone, agreements that in other industries would be illegal *per se* because they interfered with free competition. *U.S. Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 485. That scheme would be undermined if agreements like that at bar were beyond the scope of Section 15, for only agreements within its scope have antitrust immunity.

(4) Effective and orderly regulation of the shipping industry would be disrupted in still another way by a ruling exempting agreements among industry members allocating a common expense: it would invite costly, misplaced reliance and engender uncertainty, retarding sound business planning. An agreement not filed and approved under Section 15 may expose the parties to treble-damage liability, as well as an injunction, under the Sherman Act. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213. What is more, the agreement may be undone—after costly steps to implement it have been taken by the parties—in a proceeding to declare it unlawful under one of the

other provisions of the Shipping Act. Petitioner alleges that the instant agreement violates Section 16 and 17, and this Court's grant of certiorari is indication enough that the allegation is not frivolous. One can readily conceive of similar agreements that would raise even clearer questions under other provisions of the statute—for example, an agreement that imposed different charges on competing brands of automobile, or one that fixed different charges depending on the port at which the cargo was delivered. The orderly procedure is to determine the legality of such agreements under the Shipping Act and their entitlement to antitrust immunity before, not after, the parties implement and rely on them.

B. THE LINE DRAWN BY THE COMMISSION TO LIMIT THE REACH OF SECTION 15 IS UNSOUND

The Commission ruled that a cooperative agreement among persons subject to the Shipping Act is embraced by Section 15 only if it expressly imposes a burden on a shipper. Since the mechanization fund assessment agreement purported to exact contributions to the fund only from the parties to the agreement—all carriers or terminal companies—and did not expressly require that the burden of the assessment be passed on to any shipper whose cargo was assessed rather than absorbed by the Association members, it was, in the Commission's view, beyond the reach of Section 15.

We do not think that this ruling can stand in the face of the considerations canvassed in the preceding discussion. But the Commission's analysis is also

faulty on its own terms. The Commission's premise—that the Shipping Act is designed exclusively to protect shippers—is plainly false. Section 14 proscribes several practices designed to injure competing carriers, such as the use of fighting ships (see n. 9, *supra,* p. 21) and Section 15 itself requires the disapproval of agreements "unfair as between carriers." In any event, the premise does not support the Commission's conclusion. A shipper may be harmed by an agreement among the firms with whom he does business although the agreement does not purport to affect his business relations with them. We need look no further than the mechanization fund assessment agreement for a perfect example.

It blinks reality to suggest that it did not have a direct and substantial impact on shippers. Nominally, to be sure, no shipper was liable for the exaction. But maritime terminal companies—as they made clear to the Association—could not absorb in its entirety a special assessment equal to 22 percent of their normal charge and more than twice their profit. As all concerned well knew, the terminal companies had to pass it back to the shipper in the form of a higher charge. An agreement to do so would have been superfluous; to require it as a condition of applying Section 15 would be a meaningless exaltation of form over substance and would simply put a premium on ingenious draftsmanship.[11] True enough, there can be no Section

[11] The effect on the shipper is most direct, of course, when the amount of the assessment exceeds the stevedoring company's profit (as is the case with Volkswagens), but it will exist as well in cases in which the stevedoring company could

15 liability without an "agreement"—but the only agreement required by that provision is one providing a cooperative working arrangement among persons subject to the Act; it need not expressly involve shippers.[12]

The Commission deemed its rule necessary lest it be burdened with reviewing a multitude of wholly routine or trivial agreements. But the mechanization fund assessment agreement is not of that character,

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absorb the assessment and still be left with some profit. The company may not be satisfied with a reduced profit. And even if the immediate contractual or market conditions compel the stevedoring company to absorb some or all of the assessment, there has been added to the cost of handling the particular cargo an item of cost which is bound to be reflected in the stevedoring company's rates as soon as those conditions will permit.

[12] Herein lay the error of the court of appeals. It assumed with the Commission that an agreement to impose the assessment on petitioner was necessary to bring the assessment arrangement within the filing requirement of Section 15. Then, invoking *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, it deferred to the Commission's finding that there was no such agreement. As explained in the text above, such an ancillary agreement is wholly superfluous.

Although the point is not essential, we note that the finding that there was no agreement to pass on the assessment to Volkswagen is highly questionable. Initially, when petitioner made known its unwillingness to pay an additional charge covering the mechanization fund assessment, the Association planned to sue it directly. The device eventually adopted was a friendly suit between the Association and the terminal companies with the latter impleading petitioner. Either way, the inescapable inference would seem to be that the members of the Association regarded the obligation as ultimately that of the shipper, not the carrier or terminal company. This would be consistent with the traditional practice of the Association's members with respect to Association dues, which is to pass them on to the shippers in the form of higher rates.

and there can be no reasonable justification for an undiscriminating rule that excludes our agreement from the scope of Section 15 by assimilating it to such *de minimis* cases. In our view, Section 15 cannot be deemed—on the grounds of administrative convenience—to exclude an agreement that has a direct and substantial impact on shippers, as here.

This may mean that there will be some borderline cases where the obligation to file is not certain. The parties can protect themselves by filing any agreement arguably subject to Section 15.[13] Or the Commission could announce specific guidelines excusing certain defined categories of innocuous agreements from the filing requirement. There is clear precedent for such an approach. The Commission, at an early point in its enforcement of Section 15, held that a steamship conference was not obligated to submit for approval each rate change which it introduced in accordance with the terms of the general conference agreement on file with and approved by the Commission. *Section 15 Inquiry,* 1 U.S.S.B. 121. There has gradually evolved a fairly clear line between what is a change in a conference agreement and what is merely the routine application of an approved agreement. Compare *Empire States Highway Transp. Ass'n* v. *United States,* 291 F. 2d 336 (C.A.D.C.), with *Isbrandtsen Co.* v. *United States,* 211 F. 2d 51, 56 (C.A.D.C.), certiorari denied, *sub nom. Japan-Atlantic & Gulf Conference et al.* v. *United States,* 347 U.S. 990. This process of administrative clarification could be continued and extended.

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[13] Of course, this would not confer antitrust immunity were it later to be determined that the agreement was not subject to Section 15; but it would eliminate any danger of being penalized for failure to file.

C. THE ASSESSMENT AGREEMENT IS NOT EXEMPT FROM SECTION 15 BECAUSE IT IMPLEMENTS A COLLECTIVE BARGAINING AGREEMENT

A conclusion that the agreement imposing the special assessment for the mechanization fund is subject to Section 15 creates no conflict with any aspect of the national labor policy. Respondents appear to contend that, because the creation and collection of the fund was an obligation assumed in their collective bargaining agreement with the longshoremen's union, the issue of how the fund is collected from the members of the Association is an intrinsic part of the process of collective bargaining and therefore outside the scope of concern of the Maritime Commission. We agree that the Commission has not been empowered to supervise labor relations in the shipping industry. But respondents' analysis fails to make an adequate accommodation of the regulatory and labor policies which are involved.

We assume that the national labor policy permits employers to form multi-employer bargaining units, to bargain jointly with the union representing their employees and to pay the wages agreed upon in such multi-employer negotiations (see *National Labor Relations Board* v. *Brown,* 380 U.S. 278), and, accordingly, that the various stevedoring and terminal warehouse companies were free to join together in the Pacific Maritime Association and to agree among themselves on the terms and conditions of employment which they would negotiate with the union. It does not necessarily follow that the Commission must be entirely precluded from exercising any supervision of

the manner in which the activity is carried on. The Civil Aeronautics Board—proceeding under a statute (49 U.S. 1382) substantially identical to Section 15—has concluded that an agreement among air carriers to form a multi-employer bargaining unit is subject to the Board's prior approval. *Airlines Negotiating Conference Agreements,* 8 C.A.B. 354. Thus, it could be argued that while the Commission in a Section 15 proceeding could not deny permission to form a multi-employer bargaining unit, it could impose certain conditions relevant to its regulatory responsibilities—such as requiring reports of meetings or protecting the right of participating carriers to withdraw from the unit.

We do not go so far here. For purposes of deciding this case, we may assume that agreements which relate solely to collective bargaining or labor relations are excepted from the scope of Section 15 of the Shipping Act. Cf. *Kennedy* v. *Long Island R.R. Co.,* 211 F. Supp. 478 (S.D.N.Y.), affirmed, 319 F. 2d 366 (C.A. 2), certiorari denied, 375 U.S. 830. The basic agreement to provide a mechanization fund in a certain amount for the benefit of the longshoremen would appear to be of this character. And after the Association agreed to create the fund it had an ancillary obligation to collect it somehow. But at issue here is only the side agreement among the Association's members prescribing a special assessment on the cargo handled by them. Such an agreement among employers apportioning the cost of the labor contract is not a part of that contract, involves no question of labor relations, and is not subject to the jurisdiction of

the Labor Board. Indeed, the Association insisted, and the union accepted, that how the money was raised was no concern of the union. The union was satisfied with the Association's assurance that the money would be raised, and no one suggests that the Association cannot fulfill its obligation to the union by methods which do not violate the Shipping Act. Yet, while the challenged agreement involves no labor question, we have seen that it has a direct impact upon interests that the Shipping Act was designed to protect, and creates a danger of some of the specific discriminatory practices prohibited by the Act. Moreover, if the policy of the labor laws requires the exclusion of the mechanization fund assessment agreement from Section 15, it would follow with equal logic that the agreement was exempt from Sections 16 and 17 and all of the other substantive provisions of the Act—a result no one suggests.

It is argued that collective bargaining negotiations in the shipping industry might be disrupted by the delays consequent upon obtaining the Commission's approval of a method of funding a particular benefit before any step to implement the method was taken. But this unwarrantedly assumes that the Commission could not, or would not, act expeditiously in granting or withholding its approval of the method agreed upon. We assume, moreover, that ordinarily any challenge to such an agreement will concern only a particular and severable feature of it—here, the assessment on automobiles—and that the Commission is free to approve promptly, and permit immediate implementation of, so much of the agreement as is

not in dispute. This should minimize any disruptive effect on labor negotiations occasioned by the filing requirement.

There is a further point. Where, as in the present case, questions of legality apart from failure to file are raised, the agreement is under a cloud from the beginning anyway, whether or not it must be filed. An agreement such as that challenged here could, as noted *supra*, pp. 23–24, violate the antitrust laws or other provisions of the Shipping Act. Carriers and others might, therefore, decline to cooperate in carrying out such an agreement, fearing treble-damage liability and other sanctions. In these circumstances the processes of collective bargaining may be more helped than hindered by the availability of a procedure for removing legal uncertainty at the outset: filing the agreement with the Commission.[14]

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[14] A holding that the agreement should have been filed would not, we believe, entail disruption of the mechanization fund, notwithstanding that an agreement may not be lawfully implemented before approval by the Commission, if it must be filed. We assume that the members of the Pacific Martime Association, having paid the assessment voluntarily, would not seek restitution. If they did, the Commission could exercise its discretion to deny them any such relief. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 621–622; *Swift & Co.* v. *Federal Maritime Commission*, 306 F. 2d 277 (C.A.D.C.).

II

THE COMMISSION FAILED TO GIVE ADEQUATE CONSIDERATION TO THE COMPLAINT THAT THE DISPROPORTIONATE ASSESSMENT ON AUTOMOBILES WAS UNREASONABLE AND UNLAWFUL UNDER SECTIONS 16 AND 17 OF THE SHIPPING ACT

Petitioner argues not only that the mechanization fund assessment agreement is unenforceable because it was not filed with the Commission, as Section 15 of the Shipping Act in its view requires, but also, and independently, that the disproportionate assessment which the agreement imposes on automobiles violates Sections 16 and 17. The latter issue is ripe for consideration now even if the Court concludes that the agreement was required to be filed with the Commission and—not having been filed—is ineffective, since such a ruling would doubtless lead to its being filed and thus force the Commission to decide whether it should be approved. An agreement that violates a specific provision of the Act must be disapproved. We are not prepared to say, at this stage, that the Commission cannot hold that the agreement does not violate Sections 16 or 17, but we are persuaded that the Commission's analysis was fatally inadequate and that further consideration by it is necessary before it can properly approve the agreement in its entirety.

A. At the outset, we stress that there is no tenable basis for arguing that petitioner can challenge the Pacific Maritime Association's mechanization fund assessment on automobiles *only* under Section 15. Section 16, 46 U.S.C. 815, forbids "any common carrier by water, or other person subject to this Act, either

alone or in conjunction with any other person, directly or indirectly * * * to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." On its face, this provision certainly seems broad enough to permit a shipper to complain that, as a result of an agreement among carriers and marine terminal companies, he is unfairly being made to pay more to unload his cargo than other shippers.

The Commission nevertheless held that Section 16 is violated only if there is a discrimination between competitors—not the situation here because the marine terminal companies have imposed no higher charge on Volkswagens than on other automobiles. The Commission's view is supported by the interpretation that has been placed on Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1), *United States* v. *Great Northern Ry. Co.,* 301 I.C.C. 21, 26–27, on which Section 16 of the Shipping Act is modeled. *U.S. Nav. Co.* v. *Cunard S.S. Co.,* 284 U.S. 474, 480–481. However, in *New York Foreign Freight F. & B. Ass'n* v. *Federal Maritime Commission,* 337 F. 2d 289, certiorari denied, 380 U.S. 910, charges imposed on shippers in a random and unreasonable manner were held to be discriminatory under Section 16 although no competitive relationship among shippers charged the different rates had been shown. We believe this to be the better rule in view of the broad remedial purposes of the provision.

At all events, petitioner's challenge is plainly cognizable under Section 17, 46 U.S.C. 816, which re-

quires every common carrier by water in foreign commerce, "and every other person subject to this chapter," to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivery of property." It is unquestioned that the exaction of an additional charge from petitioner to unload its vehicles at West Coast ports is subject to the Commission's scrutiny under this provision. See, generally, *California* v. *United States,* 320 U.S. 577; *Baltimore & O. R. Co.* v. *United States,* 208 F. 2d 734 (C.A. 3). Nor can there be any doubt that the additional charge levied by Marine Terminals Corporation of which petitioner complains was imposed pursuant to the mechanization fund assessment agreement.

B. That brings us to the question whether the disparate treatment accorded automobiles has reasonable justification. The Pacific Maritime Association decided that it would raise the mechanization fund required by its collective bargaining agreement with the union by assessing each member 27½ cents for each revenue ton of general cargo handled and 5½ cents for each revenue ton of bulk cargo. This method is not here in dispute. What is contested is the Association's further decision to adopt as the revenue ton for automobiles, not a weight ton, equal to 2,000 pounds, but a measurement ton, equal to 40 cubic feet. The average Volkswagen vehicle weighs only 1,800 pounds, but it measures 8.7 "tons" on a volume basis. So, instead of each Volkswagen's being assessed less than 27½ cents, it was assessed $2.35.

1. On its face, this exaction was grossly disproportionate and excessive. Previously, Marine Terminals Corporation (which unloads Volkswagens at the West Coast ports) had charged petitioner $10.45 per vehicle for unloading, of which about $1 represented the terminal company's profit. It obviously could not absorb the $2.35 mechanization fund assessment itself and was compelled to increase its charge to petitioner by that amount. This was the only class of cargo for which such an adjustment was necessary, simply because it was the only one where the special assessment so drastically increased the cost of unloading; the average increase for Volkswagens—22 percent—was 10 times the average increase for packaged general cargo.

The impact on automobiles was not only disproportionate but seemingly arbitrary. Other cargo was assessed as manifested in 1959. In the case of automobiles alone did the Association abandon that procedure and adopt a uniform measurement-ton assessment regardless of the 1959 practice. No other property, we stress, was handled this way. While the Association readily yielded to the pleas of the lumber industry for special concessions beyond those granted other bulk cargo, it turned a deaf ear to the complaints of the marine terminal companies that the automobile assessment was arbitrary and unfair and contrary to accepted trade practices.

Nor can the special treatment of petitioner [15] be justified on the ground that it will receive special

[15] All automobiles were assessed the same, but as the Association well knew, 90 percent of all the automobiles handled by Marine Terminals in San Francisco and Los Angeles are Volkswagens (R. 669).

benefits from the mechanization fund. Quite the contrary—it will receive only remote and indirect benefits from the fund. Largely as the result of improvements on its own chartered vessels, the unloading of its vehicles is already at optimum efficiency. Beyond the general advantage accruing to all shippers from a stable labor situation, the mechanization agreement contributed little to petitioner and nothing remotely proportional to its share of the costs of the fund.

Nor is it a satisfactory answer to petitioner's complaint to note that volumetric measurement is a commonplace method of assessing freight charges and one that has often been applied to automobiles. The fact of overriding economic significance about the carriage of freight on a ship is that the ship has a limited capacity. The earnings of the ship owner are immediately related to the amount of freight that can be fitted into the hold and the charges that can be exacted for that quantity of freight. If all freight charges were computed on the basis of weight, a shipload of an extremely bulky commodity would yield inadequate revenue. Thus the practice has evolved of giving the carrier the option of computing freight rates for commodities of more than a standard bulk (30 cubic feet per ton) on a volumetric basis. See Bross, *Ocean Shipping* (1956), pp. 189-190; Cutley, *Ocean Freights and Chartering* (1962), pp. 400-407.

However, there is a very serious question whether it is rational to use measurement tons as the basis for

allocating one of the costs of unloading freight at the dock. Except insofar as the stevedoring operation is combined with a terminal warehousing operation (*i.e.*, the storage of goods on shore), the fact that an 1,800 pound Volkswagen occupies ten times as much space as 1,800 pounds of some other commodity seems of doubtful relevance as a ground for imposing ten times as heavy an unloading cost.

The sum of it is that none of the accepted justifications for exacting a disproportionate charge from a user of a transportation facility—the value of the service to the user, the costs of the carrier, etc.—appears to be present here.

2. The considerations suggesting the unreasonableness of the automobile assessment were virtually ignored by the Commission. It refused even to consider whether the exaction conformed to the standards of Section 16, believing that provision wholly inapplicable because no competing cargo was charged less (pp. 35, *supra*). We have already indicated why we consider this view unduly narrow; it seems especially inappropriate on the facts of this case. Unreasonably high transportation charges may fall upon a shipper with severe competitive impact even though other shippers similarly situated are subject to the same charge. Volkswagen competes in the United States domestic market against American manufacturers who ship by inland transportation. Price is obviously a crucial factor in this competition. If subjected to unreasonably high transportation charges, petitioner may suffer a significant injury to its com-

petitive position. We cannot accept that the Commission is free to disregard such possibilities.

The Commission did purport to test the reasonableness of the assessment under the standards of Section 17. It found that the assessment was not unreasonable, because substantial benefits had accrued from the mechanization fund agreement and there was no intent shown deliberately to burden automobile cargo. The Commission thought this enough, observing that there is no statutory requirement of a precise equivalence between services and charges for all users of a facility. The court of appeals reasoned that "a generally reasonable rule for assessing benefits may be maintained though it produces some instances of burdens wholly disproportionate to benefits" and concluded that in light of the historical use of tonnage formula, and the need for some practical way to divide the cost of the mechanization fund, the assessment was a reasonable " 'rough-and-ready' allocation measure" (R. 801, 799.)

Such analysis, however, is unresponsive to petitioner's complaint. Certainly, we grant that a relatively small charge, imposed uniformly on all for the benefit of all, can be justified as reasonable even though a particular shipper receives a lesser benefit than others. *Evans Cooperage, Inc.* v. *Board of Commissioners of the Port of New Orleans,* 6 F.M.B. 415. The Association's general dues may fall in this category. And doubtless considerations of ease and convenience of administration could justify assessing such a charge on a more or less arbitrary basis. Here, however, the charge is very substantial in relation to the

existing cost of the services involved; and it was not imposed uniformly. Rather, automobiles were treated differently from other classes of cargo—the 1959 manifests were not followed.

In these circumstances, it is no answer that the assessment of employers on the basis of revenue tons handled is, in general, roughly fair—for no one questions that. It is its particular application to automobiles that is challenged. We emphasize that the Association devised a special formula applicable only to automobiles. That formula cannot rationally be defended by reference to the different formula applied to other cargo. Nor can it be justified on the ground that the mechanization fund is intended to benefit shippers. Petitioner apparently benefits least, yet it is the only shipper compelled to contribute to the fund; on all other cargo, the assessment is absorbed by either the carrier or the terminal company. Finally, the absence of an intent to burden automobile cargo more than other types of cargo is not critical; it has long been established that discrimination in transportation charges and practices is to be tested by its impact, not by intent, favoritism or malice. *United States* v. *Illinois Central Railroad,* 263 U.S. 515, 523–524; *Interstate Commerce Commission* v. *Chicago Great Western Ry.,* 209 U.S. 108, 122–123. In this connection, we note petitioner's charge that the Pacific Maritime Association is dominated by common carriers who have an economic interest in increasing the cost to Volkswagen of discharging the 75 percent of its automobiles which it imports as a private charterer and that the more Volkswagen can be compelled to pay as

a private charterer the less the common carriers will have to contribute to the mechanization fund.

A strong case of unreasonableness is thus made out on this record. We think it unlikely that the disparity in treatment can be justified on any acceptable ground, such as the unavailability of any alternative formula that would better accommodate the various competing interests. But that is a question for the Commission to consider in the first instance, free of the misconceptions which cloud the opinion under review.

CONCLUSION

The judgment below should be reversed with directions to set aside the Commission's order.

Respectfully submitted.

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APPENDIX

The pertinent provisions of the Shipping Act, 1916, 39 Stat. 728, as amended, 46 U.S.C. 801 *et seq.*, are as follows:

Section 15:

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understanding, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory

or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different trades that would otherwise be naturally competitive, unless in the case of agreements between carriers, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modification, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or

after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modifications, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if otherwise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817(b) of this title and with the provisions of any regulations the Commission may adopt.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of section 1–11 and 15 of Title 15; and amendments and Acts supplementary thereto.

Whoever violates any provision of this section or of section 813a of this title shall be liable to a penalty of not more than $1,000 for each day such violation continues, to be recovered by the United States in a civil action: *Provided, however,* That the penalty provisions of this section shall not apply to leases, licenses, assignments, or other agreements of similar character for the use of terminal property or facilities which were enter into before the date of enactment of this Act, and, if continued in effect beyond said date, submitted to the Federal Maritime Commission for approval prior to or within ninety days after the enactment

of this Act, unless such leases, licenses, assignments, or other agreements for the use of terminal facilities are disapproved, modified, or canceled by the Commission and are continued in operation without regard to the Commission's action thereon. The Commission shall promptly approve, disapprove, cancel, or modify each such agreement in accordance with the provisions of this section.

Section 16:

* * * * *

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *.

* * * * *

Section 17:

* * * * *

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

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